

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEAN MICHAEL SULLIVAN,

Defendant-Appellant.

UNPUBLISHED

March 8, 2012

No. 301697

Chippewa Circuit Court

LC No. 09-000159-FH

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

STEPHENS, P.J. (*dissenting*).

I respectfully dissent. I agree that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. I also agree that defendant waived his claim of instructional error when his counsel affirmatively approved the trial court's instructions. However, because I conclude that defendant was denied the effective assistance of counsel, I would reverse and remand for a new trial.

In reaching its conclusion that defendant was not denied the effective assistance of counsel when his attorney failed to object to the omission of a specific limiting instruction, the majority relies on *People v Riley* (After Remand), 468 Mich 135; 659 NW2d 611 (2003) for the proposition that a defense attorney is not ineffective for failing to make a futile objection. In other words, the majority has concluded that counsel's performance did not fall below an objective standard of reasonableness, which is the first prong of the test for ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The specific language used by the Supreme Court in *Riley* was "[i]neffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *Id.* at 142. "Futile" has been defined as "incapable of producing any result; ineffective; useless; not successful." *Random House Webster's College Dictionary* (1995). By classifying the omitted objection as futile, the majority implies that the objection would have been denied or that it would have served no purpose. I conclude that to characterize the objection in question as futile or meritless is to disregard the contents of the record in this case.

As the majority correctly describes, when Detective Langendorf testified regarding the contents of his conversation with Nolan, defense counsel objected and cited the testimony as containing hearsay. The trial court sustained the objection and dismissed the jury. After dismissing the jury, the court sternly lectured the prosecution. The court explicitly indicated that

it was strongly considering declaring a mistrial unless the prosecution could offer a legal justification for an alternative remedy. The next day, the court stated that it was persuaded by the prosecution to issue a “specific” instruction to cure the unquestionable error that had occurred. The trial court ultimately failed to provide the instruction that it had determined was necessary to protect defendant's right to a fair trial. Defense counsel failed to object to the omission of the instruction. The majority concludes that the instruction in question was given when the trial court told the jury that it could only consider evidence that was properly admitted at trial. Therefore, because the trial court sustained the objection to Detective Langford's testimony, the majority believes that the jury understood that the testimony could not be considered.

By classifying a potential objection to the instructions as “futile,” the majority implies that the trial court did not believe an instruction other than what was given was appropriate or needed. I disagree. The trial court's reaction to Detective Langendorf's testimony was emphatic. As the majority acknowledges, the trial court stated that it would provide the jury with a specific instruction “as to what they are to do about what they did hear.” The instruction the court ultimately gave was the standard jury instruction regarding admissibility of evidence, CJI2d 3.5(7). The instruction addressed the evidence as a whole, as opposed to the specific testimony at issue. It is my conclusion that the instruction that was given was a general instruction, and not the specific instruction the trial court indicated was needed. Therefore, from the record, it appears that had defense counsel objected to the omitted instruction, that objection would have been sustained and a specific instruction would have been provided.

Similarly, to the extent that the majority uses the term “futile” because it believes that the objection would not have carried legal significance due to the provision of the general admissibility instruction, I again cannot agree. It is certainly true that there is a presumption that “instructions are presumed to cure *most* errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (emphasis added). However, as discussed above, the trial court in this case did not appear to believe that the general instruction would sufficiently cure the error at issue. By disagreeing with the trial court and asserting that the standard jury instruction sufficed in this instance, the majority discounts the importance of specific curative instructions. The improper evidence to which the jury was exposed by Detective Langendorf was not insignificant. Rather, it was the most damning piece of evidence presented at trial. Trial courts routinely provide specific curative instructions in such instances. Indeed, this Court has recognized that in some instances, despite the fact that a general instruction may apply, a specific instruction is needed. See *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987).

The improper testimony in this case was similar to the improper testimony addressed in *People v Waclawski*, 286 Mich App 634; 780 NW2d 321 (2009). Prior to the trial in *Waclawski*, the court ruled that evidence of marijuana that was seized from defendant could not be admitted unless it was introduced through a complainant who was given marijuana by the defendant. Despite that ruling, a police officer improperly testified that he seized marijuana from the defendant. When the defendant moved for a mistrial, the trial court denied the motion and held that a specific curative instruction could remedy the error. At the close of trial, a specific instruction was given regarding the officer's testimony. When affirming the trial court's denial of the motion for a mistrial, this Court referenced the effectiveness of the “comprehensive curative instruction.” *Id.* at 708-710.

Likewise, because of the inflammatory nature of the hearsay evidence in this case, a specific and comprehensive curative instruction was needed to ensure that defendant received a fair trial. My conclusion is bolstered by the evident concern of the trial court. This Court frequently states that a trial court is in a unique and superior position to observe the evidence, and judge the demeanor of jurors and the credibility of witnesses. See *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000); *People v Mack*, 190 Mich App 7, 17; 475 NW2d 830 (1991); *People v Sexton* (After Remand), 461 Mich 746, 752; 609 NW2d 822 (2000). There is no indication that the trial court thought that the sustaining of the objection was a sufficient cure to the error. Rather, in the court's lengthy soliloquy before denying the motion for mistrial, is stated that it was going to give the jury a "specific" instruction at the time of final instructions. That instruction was not given. Because of the gravity of Nolan's statement, particularly in the context of the purely circumstantial evidence that was properly admitted, it was necessary to explicitly state to the jury that the statement was not admissible and could not be considered. For this Court to now declare that an objection by trial counsel would have been futile is to discount that superior position of the very experienced trial court judge.

As described above, I conclude that the objection that defense counsel failed to make would not have proven futile. Therefore, as a result of counsel's failure to present that objection, I conclude that her performance fell below an objective standard of reasonableness. In order to be entitled to relief, defendant must also show that he was prejudiced by counsel's performance. *Toma*, 462 Mich at 302. The United States Supreme Court has stated that the proper inquiry is whether, as a result of counsel's performance, the outcome of the trial was affected and the proceeding was fundamentally unfair or unreliable. *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993). I conclude that it is reasonably certain that the failure to object to the jury instructions impacted the outcome of the proceedings and that defendant is consequently entitled to relief.

As the trial court stated after Detective Langendorf's improper testimony, the prosecution's evidence of defendant's guilt was largely circumstantial. While it is true that circumstantial evidence may be sufficient to support a conviction, I do not believe that the circumstantial evidence in this case was overwhelming. While defendant was discovered in proximity to the car wash, his clothing did not match the clothing of either of the men from the security footage. He did not personally possess any items associated with criminal activity and he fully denied any knowledge of the attempted breaking and entering. Detective Langendorf's testimony regarding Nolan's statement was easily the strongest and most direct evidence of defendant's guilt. Nolan's statement to Detective Langendorf unequivocally implicated defendant in the charged offenses. Furthermore, Detective Langendorf's improper testimony was the last piece of testimony presented to the jury. It was certainly fresh in the jurors' minds when deliberations began the next morning. Had the trial court provided a specific curative instruction as it intended, the error would have been cured. By failing to ensure that the instruction was given, defendant's counsel prejudiced her client. Additionally, the failure to remedy the improper hearsay evidence prevents me from confidently concluding that defendant's trial was fair or reliable. As discussed above, my conclusion is directly impacted by the trial court's detailed commentary regarding the nature of this error. The trial court's level of concern demonstrates that it believed the improper testimony was potentially outcome determinative if it was not remedied. The court's conclusion was the product of its direct observation of the

proceedings, the witnesses and the jurors. To dismiss the trial court's clear view of this matter is inconsistent with this Court's typical approach.

Likewise, because the testimony in question was the most notable testimony presented and was the last testimony the jury heard, I cannot conclude that counsel's failure to object to the omitted instruction can be described as a reasonable trial strategy. It is highly unlikely that these jurors, with the benefit of their collective memories, would not have recalled such a memorable and recent exchange. Further, as the majority and dissenting opinions in this case each state, jurors are presumed to follow their instructions. To conclude that a specific instruction in this case may have merely emphasized the improper evidence and negatively impacted defendant's chance of an acquittal is to imply that the jurors would not have followed that specific instruction.

Because I conclude that defense counsel's performance fell below an objective standard of reasonableness and prejudiced defendant, I would reverse and remand for a new trial. My conclusion obviates any need to discuss defendant's challenge to the sufficiency of the evidence.

/s/ Cynthia Diane Stephens